Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/12313/2013

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 29 July 2014	**On 06 August 2014**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

ENTRY CLEARANCE OFFICER - BANGKOK

Appellant

and

MANLIKA ALLEN

Respondent

Representation:

For the Appellant: Mr A McVeety, Home Office Presenting Officer
For the Respondent: Mr D Allen, Sponsor

DETERMINATION AND REASONS

1. The Entry Clearance Officer appeals against a decision of the First-tier Tribunal (Judge Kempton) allowing Manlika Allen's appeal against the ECO's decision taken on 20 May 2013 to refuse her entry clearance as a visitor under para 41 of the Immigration Rules (HC 395 as amended).

2. For convenience, I will refer to the parties as they appeared before the First-tier Tribunal.

Introduction

3. The appellant is a citizen of Thailand who was born on 7 June 1991. In 2008 the appellant met David Allen, a British citizen who was visiting Thailand. A relationship was established between the appellant and Mr Allen. On 24 May 2011, their daughter, Sophie was born in Thailand. She is a British citizen. In May 2013 they underwent a traditional Thai marriage.

4. The appellant and Mr Allen have a house in Thailand which was paid for by Mr Allen. Mr Allen financially supports the appellant and his daughter in Thailand. He has made over 20 trips to Thailand to visit his wife and (since her birth) their daughter.

5. On 28 December 2011, the appellant made an application for entry clearance to visit Mr Allen in the UK. That application was refused because, as I understand it, the ECO was not satisfied that the appellant met the requirements of para 41. In making that application, the appellant stated that she had no criminal convictions when in fact, she had a conviction in Thailand in 2009 for driving a motor scooter whilst under the influence of alcohol. But, as I say, that application was not refused on the basis of a failure to disclose that conviction.

6. The appellant's current application for entry clearance to visit Mr Allen was made on 2 May 2013. It was completed online. In that application, at question 96 the appellant discloses her criminal conviction in the following terms:

> "2009 alcohol whilst driving motorbike. 2500 BHT fine and clean temple 3 hour".

7. On 20 May 2013, the ECO refused the appellant's application for entry clearance. First, he did so under the mandatory refusal provision in para 320(7B) of the Immigration Rules on the basis of the appellant's failure to disclose her criminal conviction in her 2011 entry clearance application. Secondly, the ECO was not satisfied on the evidence presented of the relationship between the appellant and Mr Allen and further that the appellant was a genuine visitor who intended to leave at the end of her visit. Consequently, the ECO was not satisfied that the appellant met the requirements in para 40(i) and (ii) of the Rules. On 22 October 2013, the Entry Clearance Manager confirmed the ECO's decision.

The Appeal to the First-tier Tribunal

8. The appellant appealed to the First-tier Tribunal. She did not request an oral hearing and so the appeal was determined on the papers by Judge Kempton in a determination promulgated on 3 February 2014.

9. In his determination, Judge Kempton concluded that the mandatory refusal provision in para 320(7B) did not apply on the basis that the appellant's failure to disclose her 2009 conviction had not succeeded in her obtaining entry clearance. Judge Kempton went on to allow the appellant's appeal under the Immigration Rules but, in doing so, he made no findings in relation to the substantive requirement of the Rules in para 41.

The Appeal to the Upper Tribunal

10. The ECO sought permission to appeal to the Upper Tribunal on two grounds. First, the Judge had misapplied para 320(7B): the fact that the 2011 application had been unsuccessful was not relevant and the appellant had not made an "honest mistake" as she knew of her conviction and had failed to disclose it. Secondly, the Judge had erred in law by allowing the appellant's appeal without considering whether the appellant met the substantive requirements of para 41, in particular whether she was a genuine visitor.

11. On 9 April 2014, the First-tier Tribunal (Judge O'Garro) granted the ECO permission to appeal on both grounds. Thus, the appeal came before me.

12. The appellant was unrepresented but Mr Allen, the sponsor attended the hearing and spoke on the appellant's behalf. The ECO was represented by Mr McVeety.

13. Mr McVeety submitted that the Judge had misconstrued, and therefore misapplied, para 320(7B) in paragraph 11 of his determination by concluding that it did not apply because the appellant's deception in the earlier application had not been successful. In any event, Mr McVeety submitted that the Judge could not properly allow the appellant's appeal under para 41 without first deciding whether the requirements of para 41 were, in fact, met. The Judge had not done so.

14. Mr Allen explained that in 2009 the appellant had made an application through a Thai representative/consultant. She and the appellant had told the representative about the appellant's 2009 drink driving offence but the consultant, who had completed the application form, said that it was not enough to stop the appellant obtaining a visa. Consequently, it was not included on the form.

15. Mr Allen told me that in her most recent application, he had completed this online and he had included the conviction.

16. In reply, Mr McVeety indicated that, given Mr Allen's explanation, there was no reason why, if I concluded that the Judge had misapplied para 320(7B), I could not conclude that there had been no dishonesty by the appellant or her representatives with the consequence that para 320(7B) did not apply. Mr McVeety indicated that, if that was my conclusion, he

was content for me to decide whether the appellant met the requirements of para 41 on the basis of the evidence.

Paragraph 320(7B)

17. Paragraph 320(7B) of the Rules provides, so far as relevant, as follows:

> "**Grounds on which entry clearance or leave to enter the United Kingdom is to be refused**
>
> ...(7B) where the applicant has previously breached the UK's immigration laws and was over 18 at the time of his most recent breach by:
>
> ...(d) using Deception in an application for entry clearance, leave to enter or remain, or in order to obtain documents from the Secretary of State or a third party required in support of the application (whether successful or not)..."

18. The effect of the application of that provision is that entry clearance must be refused unless the deception was used for entry clearance "more than 10 years' ago" (see para 320 (7B)(i)).

19. The word "Deception" is defined in para 6 of the Rules as follows:

> "'Deception' means making false representations or submitting false documents (whether or not material to the application), or failing to disclose material facts".

20. In the context of the mandatory refusal provisions, the Court of Appeal considered the meaning of "Deception" in A v SSHD [2011] EWCA Civ 773. At [51] Rix LJ (with whom Longmore and Jacob LJJ agreed) concluded that "Deception" required proof of "dishonesty". The Court of Appeal acknowledged that this required an individual to knowingly make a false representation (the Deception).

Error of Law

21. It is clear that para 320(7B)(d) applies in a case where Deception is used in a previous application for entry clearance even if that application was ultimately unsuccessful. That might arise because the Deception was detected and so the refusal was on that basis, for example under para 320(7A) or because the application was refused on other grounds as in this appeal. That plainly follows from the wording of para 320(7B)(d) which applies where deception is used "in an application for entry clearance ....(whether successful or not)". It follows that Judge Kempton fell into error in paragraphs 11 and 12 of his determination where he said this:

> "11. ....The Rule goes on to make reference to various exceptions to the Rule and most of these relate to the assumption that the applicant was successful in an application by way of deception and travelled to the UK, but did in fact leave within the requisite timescale etc. In this case the appellant was not granted her previous application in any event, on other grounds. She did not appeal the application

> but instead decided to wait and make another application. In the circumstances, the appellant has not benefitted in any way from the non-disclosure of the conviction on the previous application. Technically she ought to have insisted to her legal advisor that she needed to mention that conviction as that is what the form asks for.
>
> 12. It appears somewhat draconian to say that the appellant has in fact used deception when in fact she did not benefit and has never been to the UK. …"

22. In principle, in my judgement para 320(7B)(d) applied to the appellant's circumstances even though her 2011 application (in which it is said a deception was used) was unsuccessful.

23. For that reason the Judge's decision to allow the appellant's appeal cannot stand.

24. In any event, even if he had been correct on his interpretation of para 320(7B)(d), the Judge could not properly allow the appeal under para 41 without considering, and finding in the appellant's favour that she met, the substantive requirements of para 41 which the ECO did not accept were met.

25. Consequently, I now turn to remake the decision under para 320(7B) and, if relevant, under para 41 also.

Remaking the Decision

26. In relation to para 320(7B)(d) as I have already indicated Mr McVeety saw no reason why I could not decide that "dishonesty" had not been established even though Mr McVeety did not concede this issue on behalf of the ECO.

27. It is, of course, for the ECO to establish on a balance of probabilities that para 320(7B)(d) applied to the appellant.

28. Both the appellant and Mr Allen have, throughout, given a consistent account of how the appellant's 2009 conviction came not to be disclosed in her 2011 application. They had consulted representatives in Thailand (whom Mr Allen told me included a British representative); they told the representative about the appellant's 2009 conviction for drink driving and were told that it was not sufficient to prevent the appellant obtaining her visa and, when the consultants completed the application, that conviction was not disclosed.

29. The requirement of "dishonesty" accepted by the Court of Appeal in the A case requires, in my judgement both knowledge of the facts which are said to amount to the deception and also an intent to deceive.

30. For present purposes, I am content to assume that dishonesty either by the appellant or her representatives would suffice even though that is not

explicitly stated in para 320(7B) but is, by contrast, in para 320(7A) when considering false representations etc made in a current application.

31. In this case, the Secretary of State has failed to establish on a balance of probabilities dishonesty by either the appellant or her legal representatives. What was done here was a mistake born, at worst, from incompetence by those advising the appellant. Incompetence alone is not the equivalent of dishonesty. I am not satisfied that either the appellant or representative intended to deceive the ECO by failing to disclose the 2009 drink driving conviction of the appellant in Thailand. The appellant and Mr Allen relied upon the advice they received from their representatives in applying for entry clearance. Those representatives were, undoubtedly, mistaken that the appellant was not required to disclose her 2009 conviction. There is, however, nothing in the evidence sufficient to discharge the burden of proof upon the ECO that the advice was other than mistaken such that it can be inferred that there was dishonesty, though not personally by the appellant, on her behalf.

32. For these reasons, therefore, I am not satisfied that para 320(7B) of the Rules applies to the appellant.

33. I now turn, therefore, to consider the substantive requirements of para 41 of the Rules which, so far as relevant, state as follows:

> "The requirements to be met by a person seeking leave to enter the United Kingdom as a general visitor are that he:
>
> (i) is genuinely seeking entry as a general visitor for a limited period as stated by him, not exceeding six months;...and
>
> (ii) intends to leave the United Kingdom at the end of the period of the visit as stated by him;..."

34. The burden of proof is upon the appellant to establish on a balance of probabilities that she met the requirements of the Rules at the date of decision.

35. In his decision, the ECO refused the appellant's application under para 41(i) and (ii) for the following reasons:

> "Within your visa application form you described yourself as unemployed and have stated that you are wholly financially dependent upon your husband, Mr David Allen. You also stated that your sponsor visits Thailand approximately 5 times a year. It would therefore not be unreasonable to expect to see evidence of this support and cohabitation in order to assess your circumstances in Thailand and therefore your intentions in the UK. Apart from a handful of photographs of your and your sponsor no other evidence has been presented in connection to your relationship. In light of this I am not satisfied on a balance of probabilities that you are genuinely seeking entry to the United Kingdom as a visitor, that you intend to leave the United Kingdom at the end of the period of the visit and that you do not intend to live for extended periods in the United Kingdom through frequent or successive visits. Paragraph 41 (i) and (ii)."

36. In confirming the ECO's decision, the ECM in his decision of 22 October 2013 stated:

> "The Entry Clearance Officer was not satisfied that adequate evidence of the appellant's relationship to the sponsor had been provided. The appellant has now submitted a letter from the sponsor, together with copies of money transfers. However, the most recent of these is dated 29 December 2012. The documents are therefore too old to provide evidence of any current ongoing relationship. Whilst some photographs have been provided, these are not in themselves evidence of an ongoing relationship. No other relevant new information has been provided."

37. It would appear that the ECO and ECM refused the appellant's application not only on the ground that they were not satisfied that she was a "genuine visitor" but also on the ground that they were not satisfied that her relationship with Mr Allen was genuine.

38. Before me, as I have already indicated, Mr McVeety was content for me to determine the appeal on the evidence before me.

39. There are a number of documents submitted on behalf of the appellant including photographs, statements from Mr Allen and from a number of others who know him, Richard Morphett, Michael Ayrton and Nigel Hellyer. There are also documents relating to the house in Thailand, paid for by Mr Allen in which the appellant and their daughter live. There is also evidence of financial support by Mr Allen of the appellant and his daughter. There is also a supporting statement from a village elder.

40. In addition, Mr Allen briefly answered a number of questions at the hearing. He emphasised that his relationship with the appellant was a genuine one. The appellant only intended to visit for a short period of time, some 4-5 weeks at the most and would return on a pre-booked flight to Thailand. He told me that the appellant lived in a village where her family lived including her mother who sometimes lived with the appellant when Mr Allen was in the UK. He told me that he had bought and built the house some 3 or 4 years ago for his wife and daughter. He told me that his daughter, Sophie is 3 years old and she is a British citizen and would be visiting with her mother. He explained that his relationship with the appellant had begun but that he had commitments in the UK and that he did not want to, in his words, shut up shop and go to Thailand until his commitments (he mentioned two elderly dogs) were resolved and their relationship was such that he should move to Thailand. He told me that it was his intention to move to Thailand rather than the appellant move to live with him in the UK. He told me that he had visited the appellant over 25 times since 2008; the last time being in June for 2 months.

41. In response to a question from Mr McVeety, Mr Allen explained that he worked as an aircraft mechanic and that he had a security pass for working in the RAF Brize Norton airbase.

42. Mr Allen was a most impressive witness. None of his evidence was challenged by way of cross-examination. I have no doubt that he is a witness of truth and I accept his evidence.

43. To the extent that it is still challenged, I accept that the relationship between the appellant and Mr Allen is a genuine one. They have been in a relationship since 2008. They have a daughter who was born in May 2011. The commitment between the appellant and Mr Allen is reflected in, not only their having a child together, but also in the frequency of his visits to Thailand to be with his wife (whom he married in Thailand in 2013) and also in the purchase of land and the construction of a home for the appellant and their daughter and their continued financial support.

44. As regards whether the appellant is a genuine visitor who will leave at the end of her visit, whilst the 'long distance' relationship may appear unusual, I accept Mr Allen's explanation that it is their intention to live in Thailand when circumstances are right. There is no intention that the appellant should live in the UK. Whilst Mr Allen has, in the past, visited the appellant in Thailand, I accept his evidence that the intention was for the appellant to visit for a holiday and now meet Mr Allen's family in the UK. The sincerity of Mr Allen's evidence both in relation to his own and his wife's intentions was evident in his oral evidence. The appellant and he have set up a home in Thailand which, I accept, is intended to be the family home not just of the appellant and their daughter but also to include Mr Allen in the fullness of time.

45. For these reasons, I am satisfied on a balance of probabilities that the appellant is a genuine visitor who intends to leave the UK at the end of her visit and consequently the requirements in para 41 (i) and (ii) were met at the date of decision.

46. As the ECO has raised no issues in relation to the remaining requirements of para 41, I am satisfied on a balance of probabilities that the appellant met the requirements of para 41.

Decision

47. The decision of the First-tier Tribunal to allow the appellant's appeal under the Immigration Rules involved the making of an error of law. That decision cannot stand and is set aside.

48. I remake the decision allowing the appellant's appeal under the Immigration Rules on the basis that : (a) para 320(7B) does not apply; and (b) the requirements of para 41 are met.

Signed

A Grubb

Judge of the Upper Tribunal

Date:

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal, I have considered whether to make a fee award and in all the circumstances I consider it appropriate to make a fee award in the full amount paid.

Signed

A Grubb
Judge of the Upper Tribunal

Date: